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CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2014, the United States took steps to protect the cultural property of China, Bulgaria, and Honduras by imposing or extending import restrictions on certain archaeological and/or ecclesiastical ethnological material from those countries. These actions were based on determinations by the Department of State's Bureau of Educational and Cultural Affairs that the statutory threshold factors permitting entry into an agreement were met, or that the factors permitting entry into the initial agreement still pertained. 19 U.S.C. §§ 2602 (a)(1) and (e), respectively. In 2014, the United States entered into one agreement and extended two pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983, and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq*. If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention.

1. China

Effective January 14, 2014, the United States and China amended and extended for five years the Memorandum of Understanding ("MOU") Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental

Sculpture and Wall Art at least 250 Years Old. Cooperation to protect the cultural property of China began in 2009 when the United States implemented import restrictions to address illicit trafficking in pillaged cultural property from China's archeological heritage. See *Digest 2009* at 525-27 regarding the original MOU. The text of the 2014 amended and extended MOU is available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*. See also the January 13, 2014 Department of State media note, available at *www.state.gov/r/pa/prs/ps/2014/01/219636.htm*. U.S. Customs and Border Protection ("CBP") of the Department of Homeland Security and the Department of the Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from China. 79 Fed. Reg. 2088 (Jan. 13, 2014).

2. Bulgaria

On January 14, 2014, the Government of the United States of America and the Government of the Republic of Bulgaria entered into an MOU, effective for five years, to protect categories of archaeological and ecclesiastical ethnological material representing the cultural heritage of Bulgaria. The State Department media note issued on January 15, 2014 announcing the agreement is available at *www.state.gov/r/pa/prs/ps/2014/01/219830.htm*. As the media note explains, the MOU also provides for the exchange of cultural property for cultural, educational, and scientific purposes. The Federal Register notice including the designated list of the types of restricted material, which range in date from 7,500 B.C. to approximately 1,750 A.D. for archaeological material and from 681 A.D. to approximately 1,750 A.D. for ethnological material, was published on January 16, 2014. 79 Fed. Reg. 2781 (Jan. 16, 2014). Both countries are parties to the 1970 UNESCO Convention. The text of the MOU is available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

3. Honduras

Effective March 12, 2014, the United States and Honduras extended for five years, and amended, their MOU "Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras." See State Department media note, March 13, 2014, available at *www.state.gov/r/pa/prs/ps/2014/03/223401.htm*. The Federal Register notice announcing that CBP of the Department of Homeland Security and the Department of the Treasury were extending the import restrictions relating to archaeological material from Honduras appeared on March 12. 79 Fed. Reg. 13,873 (Mar. 12, 2014). Import restrictions were also extended to include certain categories of ecclesiastical ethnological material. The title of the MOU was also amended to reflect the extended scope of the agreement, "Concerning the Imposition of Import Restrictions on the Archaeological Materials from the Pre-Columbian Cultures and Ecclesiastical

Ethnological Material from the Colonial Period of Honduras." The United States and Honduras began cooperating to protect cultural heritage in 2004 when they originally signed the MOU. It was previously amended and extended in 2009. See *Digest 2009* at 527-28. The media note includes the following description of the updated MOU:

> Under the terms of the updated Memorandum of Understanding, objects may enter the United States under certain restrictions, as long as no other applicable U.S. laws are violated. The restrictions only allow importation of an object accompanied by an export permit issued by Honduras, or when accompanied by either: (1) documentation verifying that a pre-Columbian archaeological object left Honduras prior to 2004; or (2) documentation verifying that ecclesiastical ethnological material left Honduras prior to 2014.

The original 2004 MOU as well as the amendments and extensions in 2009 and 2014 are available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

B. RENEWAL OF THE CHARTER OF THE CULTURAL PROPERTY ADVISORY COMMITTEE

On April 25, 2014, the charter of the Cultural Property Advisory Committee was renewed for two years. 79 Fed. Reg. 25,639 (May 5, 2014). The following background on the Committee appeared in the Federal Register notice of the renewal:

> The Committee was established by the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. 2601 *et seq*. It reviews requests from other countries seeking U.S. import restrictions on archaeological or ethnological material the pillage of which places a country's cultural heritage in jeopardy. The Committee makes findings and recommendations to the President's designee who, on behalf of the President, determines whether to impose the import restrictions. The membership of the Committee consists of private sector experts in archaeology, anthropology, or ethnology; experts in the international sale of cultural property; and representatives of museums and of the general public.

C. PRESERVATION OF AMERICA'S HERITAGE ABROAD

The Commission for the Preservation of America's Heritage Abroad ("the Commission") is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments in Central and Eastern Europe and the former Soviet Union to protect and preserve cultural heritage. The agreements focus on protection of communal properties that represent the cultural heritage of groups that were victims of genocide during World War II. The website of

the Commission describes these bilateral agreements, and refers to efforts to negotiate additional agreements, at *www.heritageabroad.gov/Agreements.aspx*. For additional background, see II Cumulative Digest 1991–1999 at 1793–94.

D. EXCHANGE VISITOR PROGRAM

On August 12, 2014, a United States district court granted the U.S. Department of State's motion to dismiss claims brought by ASSE International, a program sponsor in the U.S. Exchange Visitor Program ("EVP"). *ASSE Int'l Inc. v. Kerry*, No. SACV 14-00534-CJC (C.D. Cal 2014). ASSE was sanctioned by the State Department after a review of its compliance with EVP regulations. Sanctions included a letter of reprimand, a 15 percent reduction in the number of exchange visitors permitted in ASSE's program, and the requirement that ASSE submit a corrective action plan. ASSE's complaint claimed violations of the Administrative Procedures Act ("APA"); violations of due process; and illegal retroactive application of Department rules. Excerpts follow (with footnotes omitted) from the court's order dismissing all claims.[*]

* * * *

The Exchange Visitor Program ("EVP" or "Program") was created by Congress to allow foreign nationals to temporarily come to the United States and participate in educational and cultural exchanges, including obtaining occupational training. The purpose of the EVP is to "assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world." 22 U.S.C § 2451; *see* 22 C.F.R. § 62.1. The Program is administered by the United States Department of State, and operates through third-party organizations—program sponsors—often from within the private sector. *See* 22 U.S.C. § 1461. Program sponsors assist qualifying visitors in finding appropriate study, teaching, or training opportunities within the United States, and oversee the visitors' stay. *See* 22 C.F.R § 62.9. ASSE is one such program sponsor.

* * * *

The State Department argues that because the decision whether and how much to sanction a program sponsor are committed to its discretion by law, its decision to sanction ASSE here is not reviewable by the Court. *See* 5 U.S.C. § 701(a)(2) (exempting from judicial review "agency action committed to agency discretion by law"). That is, the State Department argues that the Court lacks subject matter jurisdiction to review the claim. The Court agrees.

* * * *

[*] Editor's note: ASSE International's appeal from the district court's dismissal was pending as of May 2015. *ASSE Int'l Inc. v. Kerry,* No. 14-56402 (9th Cir. 2014).

As an initial matter, there is no doubt that the statute authorizing the Program fully vests in the State Department the discretion to implement the EVP to the extent that the Department "considers that it would strengthen international cooperative relations." 22 U.S.C. § 2452(a). Moreover, the statute does not limit the manner in which the Department should exercise its discretion. *See, e.g.*, 22 U.S.C. §§ 2451, 2455(f).

Pursuant to its discretion, the State Department has implemented regulations creating and governing the operation of the EVP. …

The regulatory scheme does not limit the broad grant of discretionary authority provided to the State Department by the Congress. The regulation is clear that that the Department need only issue sanctions "in its discretion" and depending on its determination of the "nature and seriousness of the violation." 22 C.F.R. § 62.50(b)(1). Whether sanctions are issued, and which of the sanctions are issued, is wholly committed to the Department's judgment. *Id.* Depending on the Department's judgment as to the seriousness of the program sponsor's violations or acts endangering the exchange visitor, the Department can elect to issue "lesser sanctions," or the more serious sanctions of suspension or revocation of the program sponsor's designation as a program sponsor. *See* 22 C.F.R. §§ 62.50(b)–(d). Various levels of process are provided before sanctions are imposed, based on the seriousness of the sanction. When "lesser sanctions" are imposed, the Department must provide written notice and an opportunity to respond to the program sponsor. *See* 22 C.F.R. § 62.50(b)(2). The Department may then "in its discretion modify, withdraw, or confirm" the issued sanctions. *Id.*

Such a scheme, combined with the broad grant of Congressional authority, as well as the fact that the issues involved here squarely implicate foreign relations, which the Court has no standards or expertise to judge, make clear that the Department's ultimate decision of whether and in what amount to sanction a program sponsor like ASSE is not subject to judicial review, so long as the Department does not exceed the enumerated factors in arriving at its decision. The Court is simply not equipped to determine how serious a violation must be to warrant certain sanctions, or to decide how serious a sanction is necessary to promote the EVP's purpose of "furthering the foreign policy objectives of the United States." *See* 22 C.F.R. § 62.1(a); *see also Chong v. Director, United States Info. Agency*, 821 F.2d 171, 177 (3rd Cir. 1987) ("[C]ases involving the Exchange Visitor Program necessarily implicate foreign policy concerns and involve an agency exercising its discretionary powers in that respect.").

Moreover, it is important to note here that ASSE is not alleging that the State Department did not make the required findings before deciding to issue sanctions, or relied on a factor not available for consideration under the regulations, which the Court would have the power to review. …. Indeed, as evidenced by the multiple letters sent by the Department to ASSE outlining its reasons for issuing sanctions, the Department did make such findings. (*See* Notice of Intent; Imposition of Sanctions.) Rather, ASSE is alleging that the State Department reached the wrong conclusion in making these findings, and gave weight to the wrong evidence. (*See generally* Compl.) But whether the exchange visitor in question here spoke sufficient English to participate in the Program, or whether the third-parties employed by ASSE to provide services "[we]re adequately qualified, appropriately trained, and comply with the Exchange Visitor Program regulations," are questions well beyond the scope of any meaningful review the Court could provide. They are areas of executive action, reserved to agency discretion, because they involve "nice issues of judgment and choice …which require exercise of informed discretion," *see Helgeson*, 153 F.3d at 1004, and are rightly reserved given the serious foreign policy consequences that could result from judicial review.

* * * *

Here, ASSE's Complaint lacks any allegations that publication of ASSE's name as a sanctioned sponsor would be false or misleading. ASSE has, in fact been sanctioned by the State Department, and notifying the public of that fact would be neither false nor misleading. The public, and the international exchange visitors whom the EVP is intended to serve, have a right to know whether a program sponsor through whom they are considering participating in the Program has been previously sanctioned.

* * * *

ASSE's allegation that the State Department lacked authority to require it to "admit allegations of wrongdoing, whether true or accurate, when submitting a corrective action plan" because such a sanction was not first promulgated in accordance with 5 U.S.C. § 553 is nonsensical. The State Department has clear regulatory authority pursuant to 22 C.F.R. § 62.50(b)(iii) to require a program sponsor found to have engaged in any sanctionable act or omission, as outlined in 22 C.F.R. § 62.50(a), to submit a corrective action plan. There is simply no doubt that that regulation, which was properly approved through notice-and-comment, contemplates, and indeed is predicated upon, a finding that the program sponsor engaged in wrongdoing. ASSE's claim in this regard is dismissed.

* * * *

A procedural due process challenge of the sort brought by ASSE "hinges on proof of two elements: (1) a protect[ed] liberty or property interest . . . and (2) a denial of adequate procedural protections." *Pinnacle Armor*, 648 F.3d at 716 (quoting *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)). Here, the parties disagree whether ASSE has a property interest in maintaining its full allocation of the number of exchange visitors it can sponsor each year. The Court need not reach that question, however, because even if ASSE possesses a protected property interest, the process by which ASSE was sanctioned was fundamentally fair. ASSE therefore fails to state a valid procedural due process claim.

Under the Due Process Clause, "[a]ll that is required before a deprivation of a protected interest is 'notice and opportunity for hearing appropriate to the nature of the case.' " *Pinnacle Armor*, 648 F.3d at 717 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). "Due process is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather a "flexible" one, with "fundamental fairness" as its touchstone. *United States v. Harrington*, 749 F.3d 825, 828 (9th Cir. 2014) (citations omitted). …

Assuming ASSE has a protected property interest, the process afforded to it by the State Department prior to the imposition of "lesser sanctions" was fundamentally fair. The regulations provide that after the State Department notifies a program sponsor of an intent to sanction a program sponsor, "the sponsor may submit to the Office a statement in opposition to or mitigation of the sanction." 22 C.F.R. § 62.50(b)(2). The sponsor may include any "additional documentary material" that it believes may support its position. *Id.* Only after reviewing and considering the program sponsor's materials may the Department, "in its discretion, modify, withdraw, or confirm such sanction." *Id.*

Thus, the regulations provide sanctioned program sponsors notice of the sanctions, the basis of the sanctions, and an opportunity to rebut the Department's basis for sanctions prior to their confirmation.

Here, ASSE was afforded the process available to it under the regulations. ASSE was notified of the specific grounds on which the State Department had decided to sanction it, as well as the nature of the allegations upon which such sanctions were based. (*See* Notice of Intent.) It then gave ASSE an opportunity to respond, of which ASSE availed itself. (*See* Notice of Sanctions.) Only after addressing ASSE's opposition did the Department determine that sanctions against ASSE were warranted. (*Id.*)

Under the circumstances, more process is not warranted. ASSE was given clear notice of the claims against it, given a full and fair opportunity to respond, including submitting its own evidence in opposition, and had that evidence considered by the State Department before sanctions were levied. More trial-type procedures like those ASSE argues for were not warranted or required. ...The sanctions imposed against ASSE are "lesser sanctions" that do not deprive it of its ability to meaningfully participate in the program. In juxtaposition to ASSE's interest in its own participation in the EVP, the State Department maintains a much more important interest in achieving Congress's mandate that the Program should only operate such that it can "strengthen international cooperative relations." 22 U.S.C. § 2452(a). Clearly, swiftly regulating and sanctioning program sponsors, where warranted, is necessary to ensure that program sponsors take quick and appropriate action to resolve any wrongdoing and to further Congress's objective in providing for the EVP. Moreover, subjecting exchange visitors to adversarial proceedings, whereby they must endure cross-examination by their program sponsor, as ASSE apparently believes warranted, would certainly not serve the mandate of the EVP as a positive contributor to the United States' foreign policy efforts. While the State Department may implement such procedures, it need not do so to satisfy the Due Process Clause.

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Cross References

Chabad v. Russian Federation, **Chapter 10.A.4.d.**